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Supreme Court, U.S.
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NO.

in the

Supreme Court of the United States

October Term, 1988

ROBERT M. SCHNEBERGER, et al.,
Petitioners,

vs.

UNITED STATES TRUST COMPANY
OF NEW YORK,
a New York corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Lender Liability for Securities Fraud:**

   Does a lender's failure to disclose its knowledge of fraud in a securities transaction facilitated by its loan give rise to civil liability for aiding and abetting under §10(b) of the Securities Exchange Act of 1934?

2. **Federal Summary Judgment Procedure:**

   A) May the non-moving party who bears the burden of persuasion at trial defeat summary judgment by showing that the moving party's denial of a state of mind issue provides an implausible explanation which is inconsistent with the reasonable inferences arising from the totality of the evidence?

   B) May the non-moving party who does *not* bear the burden of persuasion at trial defeat summary judgment by showing that the moving party's denial of a state of mind issue provides an implausible explanation which is inconsistent with the reasonable inferences arising from the totality of the evidence?

LIST OF PARTIES

All parties to the proceedings in the Court below whose judgment is sought to to be reviewed are as follows:

1. Robert M. Schneberger
2. Michael L. Berry
3. Chester Casanave
4. Frances W. Casanave
5. Sheldon Haffner
6. Larry Mizrach
7. Bob J. Plyler
8. Warren J. Plo'ner
9. United States Trust Company of New York

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Petitioners, Robert M. Schneberger, Michael L. Berry, Chester Casanave, Frances W. Casanave, Sheldon Haffner, Larry Mizrach, Bob J. Plyler and Warren J. Plotner, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on November 10, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 859 F.2d 1477 (11th Cir. 1988), and is reprinted in the Appendix commencing at App.1. The Orders of the United States District Court for the Southern District of Florida have not been reported. Those Orders are reprinted in the Appendix commencing at App.12.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 10, 1988. App.21. Timely Petitions[1] for Rehearing and Suggestions for Rehearing En Banc were denied on January 31, 1989. App.23. This Petition has been filed within ninety (90) days of that date pursuant to 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following statutes, regulations and rules, set forth in the Appendix commencing at App.27, are involved in this case:

Securities Exchange Act of 1934, §10(b), 15 U.S.C. §78j;

17 C.F.R. 240.10b-5; and

Federal Rule of Civil Procedure 56(c).

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[1]Review is sought of Eleventh Circuit Case No. 87-5583 ("Schneberger case") and Eleventh Circuit Case No. 87-6025 ("Plotner case") which involved identical or closely related issues. Because the Schneberger case and the Plotner case were never formally consolidated, it was necessary to file separate petitions for rehearing. However, the Court of Appeals disposed of both cases in the opinion appearing at 859 F.2d 1477. This single petition for writ of certiorari covering both cases is submitted pursuant to Sup.Ct. R. 19.4.

STATEMENT OF THE CASE

This Petition arises from two related but unconsolidated cases. Respondent, United States Trust Company of New York ("U.S. Trust"), was a Defendant in the *Schneberger* case[2] and was the Plaintiff/Counter-Defendant in the *Plotner* case.[3] Both cases have reached this Court upon the Circuit Court's affirmance of summary judgments entered in favor of U.S. Trust by the District Court.

The *Schneberger* case was commenced by Petitioners as a securities fraud case brought against W. Randolph Wheeler ("Wheeler"), Andrew A. Levy ("Levy"), and Buckeye Petroleum, Inc., ("Buckeye"), as well as U.S. Trust and others. The *Plotner* case was commenced by U.S. Trust against Plotner for collection of a promissory note which Plotner had given in connection with the purchase of a Buckeye limited partnership interest. Plotner filed a Counterclaim against U.S. Trust along with Crossclaims against Wheeler, Levy, Buckeye and others.

In both cases, U.S. Trust was alleged to have engaged in a fraudulent scheme with Buckeye to sell worthless limited partnership interests to Petitioners. In addition, Petitioners alleged that U.S. Trust was not a holder-in-due-course of Petitioners' promissory notes which had been given for the purchase of the fraudulent limited partnership interests. In the *Schneberger* case, U.S. Trust was also alleged to have illegally drawn on Petitioners' letters of credit which had been given in connection with the promissory notes.

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[2]*Schneberger, et al. v. Wheeler, et al.*, Case No. 84-0264-Civ-EPS, in the Southern District of Florida and Case No. 87-5583 in the Eleventh Circuit.

[3]*United States Trust Company, etc. v. Plotner, et al. v. Wheeler, et al.*, Case No. 84-1859-Civ-LCN, in the Southern District of Florida and Case No. 87-6025 in the Eleventh Circuit.

Facts

Buckeye was in the business of forming and promoting oil and gas limited partnerships for which it served as general partner. U.S. Trust provided "operating loans" for Buckeye's limited partnerships. The "operating loan" concept involved a non-recourse loan to the limited partnership which was collateralized with the promissory notes and letters of credit of investors who purchased limited partnership interests. By generating a substantial tax benefit for investors, U.S. Trust's loans facilitated Buckeye's sale of limited partnership interests. U.S. Trust knew that its loans were stimulating the sale of Buckeye's limited partnership interests.[4]

Buckeye's business operations had been initiated by its principals, Levy and Wheeler, in 1976. In December, 1980, when Levy first contacted U.S. Trust to establish the Buckeye operating loan program, Levy gave U.S. Trust Vice-President Thurlow West ("West"), certain "unaudited" financial statements which portrayed Buckeye as a solvent and profitable enterprise. During the first nine months of 1981, U.S. Trust provided operating loans and other banking services for Buckeye-related parties in the belief that these "unaudited" financials accurately portrayed Buckeye's financial condition. However, in October, 1981, when U.S. Trust's outstanding Buckeye loans exceeded $1,500,000, West obtained Buckeye's *audited* financial statements which

[4]U.S. Trust officers specifically testified that they knew that the operating loans were "an important aspect of the overall program" . . . "which made the [Buckeye partnerships] more attractive to the investor" . . . and were "part of the [limited partnership offering] as ultimately put together."

disclosed Buckeye's long standing policy of commingling and misappropriating investors' contributions,[5] with a resulting $14,000,000 working capital deficit.[6]

West asked his friend and fellow U.S. Trust Vice-President, Andrew Carstensen, to review the Buckeye audited financials and to prepare a report on the company. At that time, Carstensen knew that investors would be relying on Buckeye as the general partner of a limited partnership to which U.S. Trust planned to lend money. When Carstensen submitted his report, it recited generally unfavorable or inconclusive facts with ambivalent conclusions.

Carstensen's report did not mention Buckeye's huge working capital deficit. However, Carstensen testified that he knew that Buckeye had to acquire new outside capital and new net reserves to stay in business and to fulfill its obligations to drill the wells for which it was currently committed. Nonetheless, Carstensen knew of no means by which Buckeye would be able to acquire such new net reserves or new outside capital.

Despite this knowledge of Buckeye's diversion of funds and near bankrupt condition, U.S. Trust approved operating loans for the Buckeye 1981A and 1981D programs ***after*** it

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[5]The commingling scheme involved Buckeye's wholly owned subsidiary, Inland Drilling Company, and is more fully described in *Felkay v. ZB Limited Partnership No. 1*, [1983 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶99,241 (S.D.N.Y., June 16, 1983).

[6]As reported by the 1979 audited financials, Buckeye had a working capital deficit of $14,673,731 as compared to a scant $1,025 in capital contributions. Shortly after obtaining the Buckeye audited financials, West requested personal financial statements from Wheeler and Levy which reported the *Felkay* suit (*see supra*, n.5) and a sizeable supplier suit which was pending against Wheeler and Levy as well as Buckeye.

discovered Buckeye's fraud. In connection with these approvals, U.S. Trust reviewed the 1981A and 1981D private placement memoranda, which failed to disclose Buckeye's diversion of funds and working capital deficit.

After discovering Buckeye's fraud, U.S. Trust initiated an "acknowledgement letter" program by which 1981A/1981D investors were required to waive "as against the bank" all "objections to payment of the [promissory] note which the investor may have against the partnership." U.S. Trust had neither proposed nor required "acknowledgement letters" for any of the earlier Buckeye programs it financed.[7]

Petitioners invested in the 1981A/1981D programs in December, 1981. Petitioners' investment decisions were based on the 1981A/1981D private placement memoranda which failed to disclose Buckeye's diversion of funds and working capital deficit. Each Petitioner testified that the tax benefits provided by the U.S. Trust operating loan program were an important factor in his investment decision.

By merely rejecting an investor's collateral, U.S. Trust had absolute authority to accept or reject any investor for

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[7]U.S. Trust argued in the Circuit Court that "there is no evidence that [U.S. Trust] did not require acknowledgement letters for the earlier Buckeye oil programs it financed." However, U.S. Trust ***never produced*** any acknowledgement letter for any earlier program, ***even though it was ordered to do so by the district court***. R1-211-1. When asked why U.S. Trust had not made the same request of investors for earlier Buckeye programs, Buckeye general counsel Richard Kelly responded "I don't know." Kelly deposition of April 22, 1986, p.16.

any reason.[8] Nevertheless, in February, 1982, after both West and Carstensen were aware of Buckeye's wrongdoing, U.S. Trust proceeded to accept Petitioners' promissory notes and letters of credit as collateral for the 1981A/1981D operating loans. U.S. Trust never made any effort to disclose to investors, or to cause anyone else to disclose to investors, Buckeye's misappropriations and commingling or near bankrupt condition.

U.S. Trust benefited from the 1981A/1981D loans in two respects: First, U.S. Trust received a substantial direct return in the form of fees and interest payments which totalled approximately $500,000. Secondly, the money lent to the 1981A/1981D programs provided Wheeler and Levy with general partner fees and other remuneration through Buckeye which enabled them to repay the principal, interest and fees which they owed to U.S. Trust on other unrelated loans and dealings.

In total, U.S. Trust received fees and interest payments in excess of $1,140,000 from Buckeye related dealings, making U.S. Trust the only party involved in the limited partnership promotions to profit from the Buckeye encounter. In contrast, Buckeye was forced into involuntary bankruptcy and Petitioners' lost their entire investment amounts.

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[8]U.S. Trust argued in the Circuit Court that it did not have such authority. However, Buckeye general counsel Kelly testified that "U.S. Trust had the power to reject any investor they wanted to." Kelly deposition of April 22, 1986, p.27.

REASONS FOR GRANTING THE WRIT

I. LENDER LIABILITY FOR SECURITIES FRAUD

A

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE ELEMENTS FOR DETERMINING AIDING AND ABETTING LIABILITY UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934

The decision below is in conflict with the decisions of other courts of appeal in that (1) it failed to consider the three basic elements of aiding and abetting liability; (2) it failed to consider the interrelationship among the elements; and (3) it failed to consider the element of benefit to the lender as a factor for determining liability.

(1) *The Elements of Aiding and Abetting*

In accordance with the majority view, aiding and abetting liability has three basic elements, i.e., (1) the existence of a securities law violation by the primary[9] (as opposed to the aiding and abetting) party; (2) "knowledge" of this violation on the part of the aider and abettor; and (3) "substantial assistance" by the aider and abettor in the achievement of the primary violation. *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *IIT, an*

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[9]Primary liability arises from the wrongdoers direct violation of a duty owed to the investing public under the securities laws. Gilmore & McBride, *Liability of Financial Institutions for Aiding and Abetting Violations of Securities Laws*, 42 WASH. & LEE L.REV. 811, 812 (1985). Secondary liability (of which aiding and abetting is one type) arises from the defendants' involvement with another wrongdoer's direct violation. *Id.* The doctrine of secondary liability holds a defendant liable to the same extent as the primary wrongdoer. *Id.* The line between primary and secondary liability can be vague. L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION, 1022 (2d ed. 1988).

International Investment Trust v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); *Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139, 162-63 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); 4 A. BROMBERG & L. LOWENFELS, SECURITIES Fraud & COMMODITIES FRAUD, §8.5(621), at 8:520-21 (1988).

The Fifth Circuit test, expressed in *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir. 1975), sets forth similar elements, i.e., (1) some other party has committed a securities law violation; (2) the accused party has a general awareness that his role was part of an overall activity that is improper; and (3) the accused aider and abettor knowingly and substantially assisted the violation. *Id.* The decision below purported to rely upon the *Woodward* test, but in fact omitted the first element. App.6.

Because it omitted the first element, the decision below is in conflict with the decision in *Woodward*, as well as the decisions in *Metge* and the other courts of appeal which follow the majority rule.

(2) *The Interrelationship of the Elements*

At first glance, it might seem that the Court below omitted the first element as a shortcut or mere oversight without consequence. A careful reading of the opinion, however, reveals that the Court below ignored the underlying securities violation in its entirety and specifically failed to consider both the "knowledge" requirement and the "substantial assistance" requirement within the context of the primary violation. As a result, the decision below is in conflict with *Woodward*, as well as the majority view which holds that the three elements of aiding and abetting liability may not be considered in isolation from one another. As stated by Judge Friendly in *IIT, an International Investment Trust v. Cornfeld*:

> Although this list of prerequisites has become commonplace, the exact content of the rather vague phrases, especially "knowledge" and "substantial

> assistance" is still being delineated by the courts. ***Moreover, the three requirements cannot be considered in isolation from one another. Satisfaction of the scienter requirement will, for example, depend upon the theory of primary liability*** and, as will be seen, there may be a nexus between the degree of scienter and the requirement that the alleged aider and abettor render "substantial assistance."

619 F.2d at 922. [Emphasis supplied]. *See also Metge v. Baehler*, 762 F.2d at 624.

(a) *Knowledge*

In general terms, the issue to be considered on the "knowledge" element of the aiding and abetting test is whether the alleged aider and abettor "knew that potential investors were being deceived" by the primary violator. *Harmsen v. Smith*, 693 F.2d 932, 934 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983). Here, the primary violation consisted of Buckeye's selling limited partnership interests to potential investors without disclosing its misappropriations and commingling and near bankrupt condition. Therefore, in the context of the theory of primary liability in this action, the issue to be considered on the "knowledge" element is: Did U.S. Trust know that Buckeye was selling limited partnership interests to potential investors without disclosing its diversion of funds and near bankrupt condition? In other words, Petitioners had to show that (1) U.S. Trust knew that Buckeye was selling limited partnership interests; (2) U.S. Trust knew of Buckeye's misappropriations and commingling and near bankrupt condition; and (3) U.S. Trust knew that Buckeye was not disclosing its misappropriations and commingling and near bankrupt condition to potential investors.

The particular facts which evidence U.S. Trust's knowledge of each of these factors are discussed in detail

below in conjunction with the summary judgment issue.[10] At this point, however, it is sufficient to point out that the decision below is in conflict with *Metge v. Baehler*, 752 F.2d at 624, and *IIT, an International Investment Trust v. Cornfeld*, 619 F.2d at 922, because of its failure to consider the interrelationship between U.S. Trust's "knowledge" and the theory of primary liability.

One further observation is appropriate: By virtue of its review of Buckeye's incriminating audited financials, U.S. Trust was clearly aware of Buckeye's misappropriations and commingling and near bankrupt condition. The Court below characterized this knowledge of financial misdealings and overwhelming debt as U.S. Trust's knowledge of "Buckeye's shaky financial condition." App. 8. Although it found that "U.S. Trust's loans *did* make the limited partnership interests more attractive to investors" (App.7), the Court held that "knowledge of Buckeye's weak financial situation amounts neither to a duty to disclose this information nor to knowledge of fraud." App.8.

Without considering whether "knowledge of Buckeye's weak financial situation" adequately describes U.S. Trust's knowledge of Buckeye's financial misdealings and overwhelming debt, it is clear that the financial condition of a general partner is material to a prospective limited partner's investment decision. *SEC v. Murphy*, 626 F.2d 633, 643 (9th Cir. 1980).[11] Hence, U.S. Trust's "knowledge of Buckeye's weak financial condition" constitutes knowledge of a material fact which must be disclosed.

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[10]*See*, pp. 23-25, *infra*.

[11]*See also Felkay v. ZB Limited Partnership No. 1*, [1983 Transfer Binder] Fed.Sec.L.Rep. (CCH) at 96,055, where the court examined the Buckeye scheme and found that "knowledge of [Buckeye's use of the Plaintiffs' investment proceeds for other unconnected enterprises] would be crucial for an assessment of the risks accompanying the investment.

To the extent that the decision below may be interpreted as holding that the failure to disclose a "weak financial condition" does not constitute a violation of §10(b) of the Securities Exchange Act, it is in conflict with *SEC v. Murphy*, 626 F.2d at 643.

(b) *Substantial Assistance*

Under *Metge*, the "substantial assistance" requirement necessitates activity "by the aider and abettor in the achievement of the primary violation." *Metge v. Baehler*, 762 F.2d at 624. This element may be satisfied by showing either (1) a "substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the plaintiff"; *or* (2) that "the encouragement or assistance is a substantial factor in causing the [resulting] violation." *Id.* In addition, inaction may constitute "substantial assistance" where "the plaintiff demonstrates that the aider and abettor consciously intended to assist in the perpetration of the wrongful act." *Metge*, 762 F.2d at 625. Here, U.S. Trust's operating loan program provided a tax benefit which was the motivating factor in each Petitioners' investment decision. Consequently, because the tax benefit created by the loan induced the fraudulent sale, there was a "substantial causal connection" between U.S. Trust's assistance in providing the tax benefit program and Petitioners' losses.

Because it failed to analyze the primary violation and apply the above criteria, the Court below found that U.S. Trust's " 'participation' in the alleged violation was slight at best," even though it recognized that "U.S. Trust's loans did make the limited partnership interests more attractive to investors." App.7.

Even if U.S. Trust's participation were considered to constitute inaction, the lower court's finding of no liability would be in direct conflict with *Monsen v. Consolidated Dressed Beef Co., Inc.*, 579 F.2d 793 (3d Cir. 1978), *cert. denied*, 439 U.S. 930 (1978), where a bank, as a secured lender, aided and abetted a borrower's continuation of a

securities sales program in violation of §10(b) of the Securities Exchange Act. As here, the *Monsen* bank knew that the investors were receiving no financial information about the borrower. In addition, the bank knew that the borrower would not reveal its financial difficulties to the investors. Despite this knowledge, the bank demanded that the borrower's obligations to investors be subordinated to the bank's own loans and the bank actively encouraged the borrower to continue the securities sales program. As stated by the *Monsen* court:

> Although the bank itself was not present at the sale of the securities, it had full information on each sale and it required [the borrower] to inform it of the specifics of the expanding [securities sales] program. Finally, ***it is true that the bank had no direct duty to the purchasers of the [securities], but it was not merely an innocent third party***. Rather, it enhanced its position at the expense of the [investors] with knowledge of [the borrowers] deception of the [investors].

Monsen, 579 F.2d at 803, n.17. [Emphasis supplied].

Consequently, under *Monsen*, even inaction may constitute "substantial assistance" where, as here, the defendant bank intended to assist in the fraudulent sale of securities and gained an advantage by virtue of its participation.

For the foregoing reasons, the decision below is in conflict with *Metge v. Baehler*, 762 F.2d at 624, and *Monsen v. Consolidated Dressed Beef Co., Inc.*, 579 F.2d at 800, because of its failure to consider the interrelationship between U.S. Trust's "substantial assistance" and the theory of primary liability.

(3) *"Benefit" As An Element*

U.S. Trust received substantial benefit from its

participation in the Buckeye scheme in two respects. First, it received fees and interest payments in excess of $1,140,000 from Buckeye related dealings. Second, the monies paid to the partnerships provided Wheeler and Levy with general partner fees and other remuneration through Buckeye which enabled them to repay the principal, interest and fees which they owed to U.S. Trust on other unrelated loans and dealings.

Most significantly, at the time it discovered Buckeye's fraud, U.S. Trust had outstanding more than $1,500,000 in unpaid principal amounts owed on Buckeye loans. By "going along" with Buckeye, U.S. Trust was assured that Buckeye would be able to continue its scheme of using later acquired funds to satisfy prior obligations. So long as Buckeye was able to obtain operating loans for later programs, it would be able to continue in business, although it was faced with an ever-growing working capital deficit and an ever-increasing delay in fulfilling its promises. Consequently, U.S. Trust obtained the immediate benefit of protecting its source of repayment for the outstanding loans.

Despite the benefit derived by U.S. Trust from its aiding and abetting activities, the decision below makes no reference to benefit as a factor for consideration. Because it failed to consider benefit as a factor of liability for aiding and abetting, the decision below is in conflict with the decisions in *Metge v. Baehler*, 762 F.2d at 629 ("The final inquiry we make in evaluating the relationship between [the Defendant lender] and [the primary wrongdoer] involves the extent to which [the Defendant lender] can be showed to have benefited from postponing [the primary wrongdoers'] bankruptcy"), and *Monsen v. Consolidated Dressed Beef Co., Inc.*, 579 F.2d at 803, n.17, where benefit was given substantial weight in the outcome of the case.

Benefit is important because it facilitates inferences of knowledge, substantial assistance and related concepts. 4 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES

FRAUD, §8.5(660), at 8:596 (1988). In an equitable sense, the receipt of benefit by an alleged aider and abettor is a factor in justifying liability. *Id.* It is also significant in non-privity cases since it establishes a relationship between the Plaintiffs' loss and the Defendants' gain. Consequently, the failure of the Court to consider benefit in the case at bar is a significant factor which is in conflict with the decisions of other courts of appeal.

B

THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW, i.e., LENDER LIABILITY FOR AIDING AND ABETTING UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Aiding and abetting liability is "one of the most complex and troublesome aspects of securities law."[12] Even the very validity of the concept has been questioned.[13] Nonetheless, aiding and abetting liability represents a most significant and growing body of federal securities law litigation.[14] Despite such predominance, the issue has never been directly addressed by this Court.[15]

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[12]4 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD, §8.5(615), at 8:518 (1988) [hereinafter BROMBERG].

[13]Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 60 CALIF.L.REV. 80 (1981).

[14]In May, 1988, Professor Bromberg found 1,338 court opinions since 1945 using the two words "aid" and "abet" (or their derivatives) in combination through a Westlaw word search of its FSEC-CS data base (federal securities cases). BROMBERG, *supra* note 12, §8.5(615), at 8:519. A similar search conducted by Petitioners' counsel in March, 1989, revealed 1,471 such cases.

[15]This Court has expressly reserved decision with respect to the issue of aiding and abetting liability under §10(b) of the Securities Exchange Act. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191, n.7 (1976); and *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379, n.5. A related question is now pending before this Court on Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals. *See Abell v. Wright, Lindsey & Jennings*, 858 F.2d 1104 (5th Cir. 1988), *Petition for Cert. filed*, 57 U.S.L.W. 3636 (U.S. Mar. 14, 1989) (No. 88-1518).

Aiders and abettors are frequently the only source of compensation for a deserving victim. BROMBERG, *supra* note 12, §8.5(615), at 8:518. Moreover, they may be able to spread the cost of that compensation more efficiently than the primary violator could. *Id.* In these respects, aiding and abetting liability serves an important social and economic function. *Id.*

A fundamental purpose of the securities laws was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). As repeatedly stated by this Court, "[i]t requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry." *Id.* at 186-87. *See also Silver v. New York Stock Exchange*, 373 U.S. 341, 366 (1963).

Aiding and abetting liability imposed on lenders is an effective means for ensuring that the highest ethical standards prevail. Corporate lenders will in most circumstances be more responsive to the deterrent pressure of potential sanctions than the individual promoters with whom they deal. Such lenders are more likely than ordinary promoters to be advised by counsel and thereby to be informed fully of the "allowable limits on their conduct." *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 298, 317 (1985). In many cases, as in the case at bar, the participation of the lender is the single most important factor in bringing about the securities transaction. Consequently, the lender is in a unique position to ensure compliance with the law.

At the present, however, aiding and abetting liability has produced mixed results as a deterrent device. BROMBERG, *supra* note 12, §8.5(615), at 8:519. Lenders may succeed in directing or encouraging customers to comply with the securities laws. On the other hand, the uncertainty and

unpredictability of the law raises difficult problems for the lender peripherally involved in a securities transaction who is trying to protect against liability. *Id.*

As observed by this Court, the securities laws should be applied so as to avoid "difficult questions and line drawing" to the extent possible. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 696 (1985). Uncertainties attending the applicability of the securities laws are not in the best interests of any party to a transaction. *Id.* If at all possible, decisions made on an *ad hoc* basis, which offer little predictive value to participants in securities transactions, should be avoided. *Pinter v. Dahl*, ___ U.S. ___, 108 S.Ct. 2063, 2081 (1988).

Under the present law, it is difficult, if not impossible, to predict how much investigation a lender should make to assure that no violation is involved, how much knowledge or intent or recklessness it may later be charged with, or whether its conduct will in hindsight be regarded as substantial assistance. BROMBERG, *supra* note 12, §8.5(615), at 8:519. The decision below serves only to further complicate the uncertainties surrounding this important area of federal securities law.

Commentators[16] have suggested that much can be done to improve this area of the law. For example, Professor

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[16]*See* BROMBERG, *supra* note 12, §8.5(615), at 8:520; Gilmore & McBride, *Liability of Financial Institutions for Aiding and Abetting Violations of Securities Laws*, 42 WASH. & LEE L.REV. 811 (1985); Comment, *Lender Liability for Securities Law Violations of its Borrowers*, 38 OKLA.L.REV. 113 (1985); Comment, *Lenders' Liability for Aiding and Abetting Rule 10b-5 Violations: The Knowledge Standard*, 41 SW.L.J. 925 (1987); Note, *Liability for Aiding and Abetting Violations of Rule 10b-5: The Recklessness Standard in Civil Damage Actions*, 62 TEX.L.REV. 1087 (1987); Note, *The Private Action Against a Securities Fraud Aider and Abettor: Silent and Inactive Conduct*, 29 VAND.L.REV. 1233 (1976); and Dooley, *The Effects of Civil Liability on Investment Banking and the New Issues Market*, 58 VA.L.REV. 776 (1972).

Bromberg has suggested that the elements of the action should be clarified and harmonized, "particularly as to knowledge/scienter/intent/recklessness" and that "benefit" should be given greater attention. BROMBERG, *supra* note 12, §8.5(615), at 8:520. He also noted that the factual content of the elements should be better delineated, thereby facilitating the greater use of summary judgment. *Id.* Without such improvements in the substantitive law, however, the use of summary judgment on an *ad hoc* basis, as here, can only result in greater uncertainty for participants in securities transactions and greater injustice for deserving victims of securities fraud.

In recent years, lenders have increasingly faced lawsuits alleging aiding and abetting of various securities law violations. As "deep pockets," they may be natural targets of Plaintiffs who have lost money and are left with judgment-proof debtors as primary defendants. Gilmore & McBride, *supra* note 16, at 850. In some cases, the uncertainty of the law and its application may make aider and abettor defendants, including lenders, more likely than primary violators to settle a doubtful claim. BROMBERG, *supra* note 12, §8.5(615), at 8:518. Consequently, without proper guidelines, lenders could become insurers of the securities market with no method to determine in advance the permissible parameters of their dealings. On the other hand, the law as applied in this case allows the wrongdoer-lender to "stonewall" its way to victory by hiding behind the complexities of its dealings and the uncertainties of the law.

Quite clearly, the existence of abuses on either side cannot in itself serve as grounds for summary judgment. Summary disposal, in the face of a legitimate claim, is not a viable alternative, where, as here, an unscrupulous lender has relied upon its borrower's dealings in securities to protect its selfish interests to the detriment of deserving victims.

A balance must be reached to shield lenders dealing in good faith while at the same time preserving the protections

provided to victimized investors under §10(b) of the Securities Exchange Act. Of course, care must be taken to foster the congressional intent that the securities laws be interpreted flexibly to protect investors,[17] to eliminate deceptive practices "detrimental to the interests of the investor"[18] and to encourage private rights of action which "provide a most effective weapon in the enforcement of the securities laws and are a necessary supplement to Commission action."[19]

The status of the current law has been questioned by lenders as well as victimized investors. While the vantage point of these competing interests may differ, appreciation for the importance of the question has not. From the lender's viewpoint, the need for this Court's attention to this important question may be summarized as follows:

> The need for financial institutions to be able to determine in advance the permissible parameters is paramount. Because one of the basic policies underlying the allowance of private civil actions is deterrence, participants, including secondary participants, in the securities markets must have some framework within which to pattern their actions. The theory of an efficient marketplace assumes knowledge of the legal rules within which each individual must operate. ***A failure to define clearly these legal rules not only results in an***

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[17] *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

[18] S.Rep.No. 792, 73d Cong. 2d Sess., 18 (1934).

[19] *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 298, 308 (1985); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

inefficient marketplace but also allocates risks unfairly.[20]

The decision below contributes substantially to the uncertainty and confusion surrounding lender liability for securities fraud. However, the effect of such uncertainty and confusion goes far beyond unscrupulous lenders and victimized investors. Rather, it affects the willingness of both lenders and investors to participate in securities transactions; it affects the availability of capital for legitimate business enterprises; and it affects the efficacy of the law in deterring fraud. Consequently, the decision below presents an important question of federal law which should be settled by this Court.

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[20]Gilmore & McBride, *supra* note 16, at 851 [Emphasis supplied].

II. FEDERAL SUMMARY JUDGMENT PROCEDURE

A

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE OPERATION OF FEDERAL SUMMARY JUDGMENT PROCEDURE AND THE NATURE OF INFERENCES TO BE DRAWN IN FAVOR OF THE NON-MOVING PARTY

This Court recently emphasized that "[c]redibility determinations, the weighing of evidence, and the ***drawing of legitimate inferences*** from the facts ***are jury functions***, not those of a judge. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) [Emphasis supplied]. As previously recognized in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970), this Court stressed that "[t]he evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255.

In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), the Court specifically observed that summary procedures are ill-suited for complex litigation "where ***motive*** and ***intent*** play leading roles, the proof is largely in the hands of the alleged co-conspirators, and hostile witnesses thicken the plot." *Id.* [Emphasis supplied].

This Court has recently observed that summary judgment procedure should not be regarded as a "disfavored procedural shortcut." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). However, the Court has also cautioned that its recent reassessment of summary judgment procedure "by no means authorizes trial on affidavits." *Anderson*, 477 U.S. at 255.

Anderson specifically held that a plaintiff may not defeat a defendant's properly supported motion for summary judgment in a conspiracy case "by merely asserting that the jury might and legally could disbelieve the defendant's denial

of a conspiracy or of legal malice." *Id.*, at 256. Here, Petitioners are not merely asserting that a jury might disbelieve defendant's denials. Rather, Petitioners point to "concrete evidence" from which a jury may draw legitimate inferences of U.S. Trust's knowledge of its role in the Buckeye fraud, such as (1) West's receipt of Buckeye's incriminating audited financial statements; (2) West's knowledge that Buckeye had initially misled him, as evidenced by the discrepancy between Buckeye's unaudited financial statements and the incriminating audited financial statements; (3) U.S. Trust's possession and review of the 1981A/1981D private placement memoranda; (4) U.S. Trust's sudden insistence on acknowledgment letters; (5) Carstensen's testimony and memorandum concerning his knowledge of Buckeye's problems; (6) U.S. Trust's dealings with Levy and Wheeler on other matters; (7) U.S. Trust's knowledge of the *Felkay* suit and supplier demands on Levy and Wheeler; and (8) U.S. Trust's knowledge that its loans made the Buckeye partnerships more attractive to investors.

It may be reasonably inferred that West felt deceived when he received Buckeye's incriminating audited financials. On the other hand, West was faced with probable defaults on the other Buckeye-related loans if Buckeye was unable to continue its cash flow by raising funds from the continued sale of limited partnership interests. Consequently, West "went along" with the Buckeye scheme on the expectation that the scheme could continue to function so long as Buckeye was able to fund its operations with investors' contributions obtained from the future continuing sale of limited partnership interests.

West may have rationalized that no one would be hurt if Buckeye could just continue until it developed enough oil properties to catch up on its working capital deficit. However, as is discussed in greater detail below, the inference is clear that West knew that prospective investors would not continue to purchase Buckeye limited partnership interests if they

were told that their money was going to be used to drill wells for earlier programs in which they had no investment interest.

As discussed above,[21] in order to satisfy the "knowledge" element of the aiding and abetting test, Petitioners had to show that (1) U.S. Trust knew that Buckeye was selling limited partnership interests; (2) U.S. Trust knew of Buckeye's misappropriations and commingling and near bankrupt condition; and (3) U.S. Trust knew that Buckeye was not disclosing its misappropriations and commingling and near bankrupt condition to potential investors.

Here, the testimony of West and Carstensen makes it clear that U.S. Trust was aware of Buckeye's commingling, misappropriations and near bankrupt condition. Moreover, U.S. Trust clearly knew that Buckeye was selling limited partnership interests since U.S. Trust was involved in processing the investors' promissory notes and letters of credit as collateral for the operating loans. The only question remaining is whether U.S. Trust knew that Buckeye was not disclosing its financial misdealings and overwhelming debt to potential investors.

There is no direct testimony that U.S. Trust knew that Buckeye was deceiving the investors. However, as remarked by this Court, "proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendants' state of mind supports a ***lower standard of proof.***" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 391 n.30 (1983). [Emphasis supplied].

Here, there are several facts which support an inference that U.S. Trust knew that Buckeye was not disclosing its misappropriations and commingling and near bankrupt condition to prospective investors.

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[21] *See* pp. 10-11, *supra*.

First, U.S. Trust had reviewed copies of the 1981A/1981D private placement memoranda from which it was readily apparent that no such disclosure was made. ***Second***, U.S. Trust suddenly insisted on acknowledgment letters[22] for the 1981A/1981D programs when no such requirement was even suggested for the earlier programs.

Finally, it was patently obvious that no informed investor would have agreed to risk his money in the Buckeye scheme. It is manifestly ***implausible*** that U.S. Trust could have believed that any informed investor would have committed to pay his money for the development of earlier programs which were owned by other persons. To believe that such investor would be willing to give his money and promissory note merely to ensure the perpetuation of Buckeye's scheme of commingling and misappropriation ***simply makes no economic sense.*** *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where the factual context renders a claim implausible, the proponent of the claim "must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id.*

Here, U.S. Trust failed to offer ***any*** evidence which would explain its failure to recognize the obvious. However, the

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[22]The "acknowledgement letters" were required by U.S. Trust in an apparent attempt to avoid liability for Buckeye's fraud. In the lower court, U.S. Trust argued that the acknowledgment letters were an absolute bar to Plaintiffs' claims. However, the remedial aspects of the securities laws cannot be waived. §29(a), Securities Exchange Act of 1934; *Wilko v. Swan*, 346 U.S. 427 (1953). Consequently, the form has no legal significance . . . except to the extent that its very use is evidence that U.S. Trust knew it was participating in an illegal transaction. *See, Doody v. E.F. Hutton & Co.*, 587 F.Supp. 829 (D.Minn. 1984); *In the Matter of Linder, Bilotti & Co., Inc.*, 42 S.E.C. 407, 408 (1964); *Meason v. Gilbert*, 236 Ga. 862, 226 S.E.2d 49, 51 (1976).

Court below not only failed to require the movant, U.S. Trust, to produce "more persuasive evidence" to show its lack of appreciation for the obvious but it also failed to draw every "legitimate inference" in favor of Petitioners, as the non-movants.

Most certainly, U.S. Trust could argue ***at trial*** that West's sudden insistence on acknowledgement letters was a mere coincidence. It could also suggest that West was under unusual stress or was otherwise so incapacitated that he was unable to interrelate or understand the significance of the facts which came to his attention. A similar argument, although more difficult, could be made with respect to West's friend, Carstensen. However, ***on motion for summary judgment***, the Petitioners, as ***non-movants***, are entitled to have every ***"legitimate inference"*** drawn in their favor. *Anderson*, 477 U.S. at 255. Because the Schneberger decision failed to recognize and follow this standard, and the other standards discussed above, it has decided a federal question in a way in conflict with applicable decisions of this Court.

The decision below is also in conflict with *Metge v. Baehler*, 762 F.2d 62 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986), with respect to the application of federal summary judgment procedure to an action for aiding and abetting violations of §10(b) of the Securities Exchange Act. In *Metge*, the Eighth Circuit Court of Appeals reviewed a trial court's grant of summary judgment in favor of a defendant bank which had been sued for aiding and abetting a violation of §10(b). In reversing the trial court's summary judgment in favor of the bank, the Eighth Circuit found that the ***totality of events*** gave rise to inferences of knowledge and assistance which necessitated reversal of the summary judgment even though the bank's dealings and transactions were "unremarkable" when "viewed separately." *Metge*, 762 F.2d at 626. As stated by the *Metge* court:

> Although the facts we have recounted here at length are unremarkable taken in isolation, we find that

> taken together, they present what should have been a jury issue on the question of aiding and abetting liability. In sum, ***we have remarked on an unusually favorable banking relationship between the two parties at a time when [the bank] knew of [the promoter's] precarious financial position***. Moreover, the evidence suggests that [the bank] had knowledge of the [securities] program and its importance to [the promoter's] ability to repay [the bank's] loan to [the promoter]. Finally, we find an inference arising from the evidence which suggests that, although [the bank] made no profit on its loans to [the promoter] nor even recovered its outstanding funds by postponing [the promoter's] demise, it may have been able to lever itself into a more favorable position than the [plaintiffs].

Metge, 762 F.2d at 630. [Emphasis supplied].

The decision below is in conflict with *Metge* in that it failed to draw every "legitimate inference" from the ***totality*** of the evidence. Instead, the *Schneberger* court narrowed its focus on isolated facts without considering the effect of the evidence in the case as a whole. *See also Matshushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. at 587.

B

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE OPERATION OF FEDERAL SUMMARY JUDGMENT PROCEDURE WHERE THE MOVANT BEARS THE BURDEN OF PERSUASION AT TRIAL

The question of U.S. Trust's status as a holder-in-due-course of Petitioner's promissory notes is a key consideration in U.S. Trust's claim against Plotner on his promissory note as well as the other Petitioners' claims against U.S. Trust for breach of the presentment warranty arising under U.C.C.

§5-111(1) [§675.111(1), Fla.Stat.][23] Under Florida law, U.S. Trust, as the party claiming that it was a holder-in-due-course, had the burden affirmatively to establish that this was in fact true. §673.307(3), Fla.Stat.; *Seinfeld v. Commercial Bank and Trust Co.*, 405 So.2d 1039, 1041 (Fla. 3d DCA 1981). In order to sustain its burden, U.S. Trust was required to show that it acted in ***good faith*** **and** ***without notice*** of any defense against Petitioners' promissory notes. §673.302(1), Fla.Stat.; *Seinfeld*, 405 So.2d at 1041.

As a movant for summary judgment who had the burden of persuasion at trial, U.S. Trust was required to "support its motion with credible evidence. . .that would entitle it to a directed verdict if not controverted at trial." *Celotex*, 477 U.S. at 331, Justice Brennan, dissenting.[24] If U.S. Trust had so supported its motion, the burden of producing evidence to demonstrate the existence of a genuine issue of material fact would have shifted to Petitioners. *Id.* Under such circumstances, the principles discussed in Section II.A. above would apply, i.e., every "legitimate inference" would have to be drawn in favor of Petitioners, as the non-movants. Therefore, the decision of the Court below on this particular question would have been in conflict with the decisions of this Court for the reasons discussed in Section II.A. above.

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[23]Under U.C.C. §5-111(1) [§675.111(1), Fla.Stat.], a beneficiary drawing on a letter of credit warrants that the underlying transaction is valid. Here, by drawing on Petitioners' letters of credit, U.S. Trust warranted that Petitioners' promissory notes were enforceable, i.e., that U.S. Trust was a holder-in-due-course. *See Shaffer v. Brooklyn Park Apartments*, 311 Minn. 452, 250 N.W. 2d 172, 178 (1977); *Morgan v. Depositors Trust Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 1473 (Me. 1982).

[24]Although Justice Brennan dissented with the conclusions of the majority, his theoretical approach was consistent with the *Celotex* majority. 477 U.S. at 334. *See also* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE, §2727, (2d ed. 1983).

However, U.S. Trust failed to submit any evidence to support its burden of proving that it acted in good faith and without notice of any defense against Petitioners' promissory notes. Consequently, the burden of production never shifted to Appellants, *Celotex*, 477 U.S. at 331, and U.S. Trust's Motion for Summary Judgment on the commercial paper issue should have been denied without further consideration of Petitioners' evidence respecting U.S. Trust's state of mind.

Because it granted U.S. Trust's Motion for Summary Judgment on the holder-in-due-course issue, the decision of the Court below is in conflict with the decisions of this Court as to the operation of federal summary judgment procedure.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

Appendix

Robert M. SCHNEBERGER, et al.,

Plaintiffs–Appellants,

v.

W. Randolph WHEELER, et al.,

Defendants,

United States Trust Company of New York,
a New York Corporation,

Defendant–Appellee.

UNITED STATES TRUST COMPANY OF NEW YORK,
A New York Corporation,

Plaintiff–Counterclaim–Plaintiff–Appellant,

v.

Warren J. PLOTNER,

Defendant–Counterclaim–Plaintiff–Appellant,

v.

Randolph WHEELER, Andrew A. Levy,
and Buckeye Petroleum Co., et al.,

Counterclaim–Defendants.

Nos. 87-5583, 87-6025.

United States Court of Appeals,
Eleventh Circuit.

Nov. 10, 1988.

Investors in limited partnership brought securities fraud action against bank which had provided financing in return for their promissory notes, and bank brought action to recover on note against one investor. The United States District Court for the Southern District of Florida, No. 84-1859-CIV-LCN, Lenore Carrero Nesbitt, J., and, No. 84-0264-CIV-EPS, Eugene P. Spellman, J., entered judgments in favor of bank,

and investors appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) bank could not be held liable under Florida Security and Investor Protection Act; (2) bank could not be held liable as aider and abettor of security violations by sponsor of the limited partnerships; (3) promissory notes given by investors were not void; and (4) bank was entitled to status of holder in due course of the notes.

Affirmed.

1. Securities Regulation —258

Bank which lent money to limited partnerships based on the security to be provided by promissory notes of investors and letters of credit issued by bank was not an offeror, seller, or agent of seller of the limited partnership for purposes of liability under the Florida Security and Investor Protection Act. West's F.S.A. §§ 517.07, 517.211, 517.301.

2. Securities Regulation —60.45(1)

Knowledge of both the fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability under § 10(b); that knowledge may be inferred from circumstantial evidence. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

3. Securities Regulation —60.41

Bank which lent money to limited partnerships based on the security provided by investors promissory notes was not an aider and abettor of any 10b-5 violations on basis of facts that it knew that its loan program would make investments more attractive, had financial statements which raised questions about the financial solidity of the sponsor, knew that the sponsor had been sued by an investor and a supplier, and insisted that investors execute acknowledgment letters. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

4. Securities Regulation —60.28(2)

Bank's knowledge of weak financial situation of sponsor of limited partnerships to which it lent money did not give rise either to a duty to disclose that information to investors in the limited partnerships nor to knowledge of any fraud for purposes of aider and abettor liability. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

5. Bills and Notes —111, 365(1)
Contracts —98

If a contract or note is void ab initio, it is a nullity and that defense applies even against a holder in due course.

6. Bills and Notes —106

Promissory notes given by investors in limited partnerships and held by bank would not be treated as illegal and void ab initio in view of the bank's minor and lawful involvement in the alleged illegal scheme represented by the limited partnerships.

7. Securities Regulation —35.24

Even if notes given by investors in limited partnership and held by bank were executed in connection with unenforceable agreements, they were merely voidable and not void nullities under the Securities Exchange Act, and holder-in-due course doctrine could apply in bank's action to recover on the notes. Securities Exchange Act of 1934, § 29(c), 15 U.S.C.A. § 78cc(c).

8. Bills and Notes —337

In the absence that bank which provided loans to limited partnerships in exchange for investors' promissory notes knew that sponsor of the limited partnerships was guilty of fraud, its status as holder in due course of the notes could not be avoided on the grounds of bad faith.

9. Bills and Notes —341

Close-connection doctrine is an exception to the holder in due course defense when a financial institution has a close working relationship with the seller in a consumer credit transaction.

10. Bills and Notes —341

In a commercial setting, more than just a close connection between the financial institution and the seller in a consumer transaction must be shown before the institution, as assignee of promissory notes will be denied the status of a holder in due course.

11. Bills and Notes —341

Close connection doctrine did not apply to defeat bank's status as holder in due course of promissory given by investors in limited partnership where the bank was not formed and did not exist exclusively to finance the partnership shares, the sponsor of the partnerships was not owned or controlled by the bank, and the bank did not affirm any promises made by the sponsor nor solicit investors for the sponsor.

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH and EDMONDSON, Circuit Judges, and HOFFMAN*, District Judge.

EDMONDSON, Circuit Judge:

Appellants allege that U.S. Trust violated the Florida Securities and Investor Protection Act and Section 10(b) of the Securities Exchange Act of 1934. Appellants base additional counts on conspiracy and the Uniform Commercial Code. U.S. Trust's motions for summary judgment were granted in these separate but related cases. We affirm.

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*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

I. *Facts*

William Randolph Wheeler and Andrew A. Levy organized Buckeye Petroleum Company, Inc., to form oil and gas limited partnerships. Wheeler and Levy, on behalf of Buckeye, arranged a letter of credit loan program with U.S. Trust, a financial institution, for Buckeye oil and gas limited partnerships. Based on the security to be provided by the promissory notes of investors and letters of credit issued by banks, U.S. Trust proceeded to lend money to limited partnerships formed by Buckeye, Wheeler and Levy. The investors in these limited partnerships, including appellants, never spoke to anyone at U.S. Trust before agreeing to purchase their Buckeye limited partnership interests. U.S. Trust required each appellant to sign an acknowledgement letter by which the signer waived "as against the Bank any defenses, set-offs, counter-claims or other objections to the payment of the Note which they may have against the Partnership."

In October 1981, U.S. Trust received financial statements from Buckeye. Andrew Carstensen, a U.S. Trust officer, made a detailed analysis of the statements. Although Carstensen's analysis was not, on the whole, negative, it did raise questions about the financial solidity of Buckeye. In December 1981, Thurlow West, a vice-president in the personal banking group at U.S. Trust, discussed with Levy an investor suit and a supplier suit against Buckeye.

In the summer of 1983, U.S. Trust agreed to extend for one year its loans to the limited partnerships. Buckeye gave all investors, including the appellants, the option of paying off the entire amount due on their promissory notes or executing new promissory notes to extend the letters of credit. Michael Berry elected to pay off his promissory note. Sheldon Haffner and Larry Mizrach elected to allow U.S. Trust to draw on its letters of credit to pay off their notes. All other appellants executed new promissory notes. Appellant Warren Plotner eventually failed to pay the balance on his note.

Appellants filed suit (*Schneberger et al., v. Wheeler*) alleging that U.S. Trust participated in the illegal sale of the limited partnership interests promoted by Wheeler, Levy and Buckeye. The district court granted U.S. Trust's Motion for Summary Judgment on these claims. In a separate suit, U.S. Trust sued Plotner on his promissory note, and the trial court granted U.S. Trust's Motion for Summary Judgment. Although the Plotner case was never formally consolidated with the earlier Schneberger action, the trial court in the Plotner proceedings predicated its summary judgment upon the *res judicata* effect of the summary judgment entered in the Schneberger suit. The district court entered final judgment in favor of U.S. Trust and granted U.S. Trust's Motion for Certification pursuant to Rule 54(b).

II. *Securities Law Claims*

A. Florida Security and Investor Protection Act

[1] Appellants claim that U.S. Trust violated Fla.Stat. section 517.07 and Fla.Stat. section 517.301. Fla.Stat. section 517.211 extends liability under these sections to a "person making the sale," a "person . . . selling a security," and a "director, officer, partner, or agent of or for the seller." Because there is no evidence that U.S. Trust was an offeror, a seller or an agent of a seller, appellants' claims under the Florida Security and Investor Protection Act are without merit.

B. Section 10(b)

Woodward v. Metro Bank of Dallas sets forth the elements necessary to establish liability for damages as an aider and abettor of a violation of section 10(b) or Rule 10b-5: "[A] person may be held as an aider and abettor only if . . . the accused party had general awareness that his role was part of an overall activity that is improper, and if the accused aider-abettor knowingly and substantially assisted the violation." 522 F.2d 84, 94-95 (5th Cir.1975); *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1009 (11th Cir.1985).

[2, 3] *Woodward and Woods* make clear that knowledge of both the fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability. *Woods*, 765 F.2d at 1010. This knowledge may be inferred from circumstantial evidence. *Woodward*, 522 F.2d at 96. As evidence of U.S. Trust's scienter, appellants point to the following facts: (1) U.S. Trust knew that its loan program would make the investment more attractive; (2) U.S. Trust had Buckeye's financial statements which raised questions about the financial solidity of Buckeye; (3) U.S. Trust knew that Buckeye had been sued by an investor and a supplier; and (4) U.S. Trust insisted that appellants execute acknowledgment letters.

The degree of scienter necessary to make out a section 10(b) claim varies with the circumstances of each case:

> For a defendant whose only role is to remain silent in the face of securities violations, liability might depend upon a duty owned to the other parties. . . . A defendant who is not under any duty to disclose can be found liable . . . only if he acts with a high degree of scienter, that is, with a "conscious intent" to aid the fraud. . . . [L]iability could be imposed upon an aider and abettor who is under a duty to disclose if he acts with a lesser degree of scienter. For an aider and abettor who combines silence with affirmative assistance, the degree of knowledge required should depend upon how ordinary the assisting activity is . . .

Woods, 765 F.2d at 1010.

[4] Appellants argue that U.S. Trust did more than remain silent in the face of securities violations. Although U.S. Trust's loans did make the limited partnership interests more attractive to investors, this "participation" in the alleged violation was slight at best. U.S. Trust had no duty to disclose based upon its role as lender. The question is

therefore whether there is a genuine issue that U.S. Trust possessed a degree of scienter sufficient, in the light of its slight level of participation in the alleged wrongdoing, for aider and abettor liability. We hold that there was not. The evidence of scienter cited by appellants shows at most that U.S. Trust knew about Buckeye's shaky financial situation. Knowledge of Buckeye's weak financial situation amounts neither to a duty to disclose this information nor to knowledge of fraud. There is no genuine issue that U.S. Trust possessed a mix of scienter and participation sufficient for aider and abettor liability under section 10b-5.

III. *Breach of Warranty*

[5] Appellants claim also that U.S. Trust is liable for wrongfully calling the investor's letters of credit and seeking to enforce the promissory notes. Appellants contend that U.S. Trust warranted that the promissory notes were valid, but that the notes were void as products of an illegal transaction. If a contract or note is void *ab initio*, it is a nullity. This defense applies even against a holder in due course.

A. Validity of Promissory Notes

[6] Appellants cite *Frye v. Taylor*, 263 So.2d 835 (Fla. 4th Dist. Ct. App. 1972), and *Edwards v. Trulis*, 212 So.2d 893 (Fla. 1st Dist. Ct. App. 1968). These cases hold that contracts made in violation of law are void. In *Frye*, the plaintiff sponsored the defendant's elevation to a directorship position in an illegal pyramid scheme. The defendant executed a promissory note to secure a loan made by the plaintiff to enable the defendant to purchase the directorship. The court held that "[s]ince the note in question was given in consideration of participation in an illegal transaction the obligation evidenced thereby is a nullity and is of no legal effect." *Frye*, 263 So.2d at 840. The court hoped to deter illegal contracts by refusing to enforce them. *Id.*

Similarly, in *Edwards* the court refused to allow an unlicensed stockbroker to enforce an oral brokerage contract

providing for commissions. Unlike the contract in *Edwards*, the notes at issue in the instant case were not given in violation of any statute. Limited partnerships for oil and gas exploration, unlike pyramid schemes (*Frye*) or unregistered dealing in securities (*Edwards*), are lawful. The deterrence rationale was especially applicable upon the facts of *Frye* because the lender in that case was plainly a co-participant in the illegal scheme. In fact, the lender recruited the borrower to participate in the scheme. The purpose served in *Frye* would not be equally served in the instant case where U.S. Trust's involvement in the alleged illegal scheme is minor and lawful.

[7] Nor are the promissory notes void under section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) which provides in pertinent part: "Every contract made in violation of any provision of this chapter . . . shall be void . . . as regards the rights of any person who . . . shall have acquired any right thereunder with actual knowledge of the facts by reason of which the . . . contract was in violation. . . ." Section 29(c) provides further: "Nothing in this chapter shall be construed . . . to afford a defense to the collection of any debt . . . by any person who shall have acquired such debt . . . in good faith for value and without actual knowledge of the violation of any provision of this chapter . . . affecting the legality of such debt. . . ." 15 U.S.C.A. section 78cc(c). Any possible uncertainty as to the meaning of these sections was eliminated by the Supreme Court in *Mills v. Electric Auto-Lite Company*:

> This language establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party, but it does not compel the conclusion that the contract is a nullity, creating no enforceable rights even in a party innocent of the violation. The lower federal courts have read [section] 29(b) . . . as rendering the contract *merely voidable* at the option of the innocent party. . . . This interpretation is eminently sensible.

396 U.S. 375, 387-88, 90 S.Ct. 616, 623, 24 L.Ed.2d 593 (1970) (emphasis added) (citations and footnotes omitted). Even if the notes were executed in connection with unenforceable agreements, they were voidable, not void nullities. The holder-in-due-course doctrine may therefore apply.

B. Holder in Due Course

[8] Appellants argue two grounds for denying U.S. Trust the protection afforded a holder in due course: bad faith and the close connection doctrine. Because appellants' strongest evidence of bad faith is insufficient to constitute evidence that U.S. Trust knew that Buckeye was guilty of fraud, the bad faith ground is without merit, and we turn to consideration of Florida's close-connection doctrine.

[9-11] The close-connection doctrine is an exception to the holder-in-due-course defense when a financial institution has a close working relationship with the seller in a consumer credit transaction. *First New England Financial Corporation v. Woffard*, 421 So.2d 590 (Fla. 5th Dist. Ct. App. 1982). In a commercial setting, more than just a close connection must be shown before the assignee will be denied the status of holder in due course. *Equico Lessors, Inc. v. Ramadan*, 493 So.2d 516 (Fla. 1st Dist. Ct. App. 1986). "We have not been able to locate any case in which the court has invalidated a waiver of defense clause in a commercial transaction based on close connections alone." *Leasing Service Corp. v. River City Construction, Inc.*, 743 F.2d 871, 876 (11th Cir.1984). The close-connection doctrine does not apply to this commercial transaction: U.S. Trust was not formed and does not exist exclusively to finance Buckeye's partnership shares; Buckeye is in no sense owned or controlled by U.S. Trust; also, U.S. Trust did not affirm any promises made by Buckeye or solicit investors for Buckeye. Because U.S. Trust is a holder in due course of the promissory notes, none of appellants' defenses, which may be valid as against Buckeye, are available against U.S. Trust.

IV. *Conclusion*

Appellants claim also that there was circumstantial evidence to support a finding of conspiracy. As evidence of a conspiracy appellants present these facts: (1) U.S. Trust's loans made the limited partnership interests more attractive to investors; and (2) U.S. Trust knew of Buckeye's financial difficulties. We hold that this "circumstantial evidence" is insufficient for us to infer an agreement between Buckeye and U.S. Trust.

The summary judgment "standard requires that we resolve all reasonable doubts in favor of the nonmoving party, . . . but it does not require us to resolve *all* doubts in such a manner." *Barnes v. Southwest Forest Industries, Inc.*, 814 F.2d 607, 609 (1987). Appellants—who would bear the burden of proof at trial—have failed to present evidence adequate to raise a genuine issue as to the essential elements of either their securities or commercial paper claims. *See generally Brown v. City of Clewiston*, 848 F.2d 1534, 1537, 1540 n. 12 (1988) (discussing standard of review in summary judgment cases).

Accordingly, the trial courts' orders granting summary judgment in favor of U.S. Trust are AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-0264-CIV-SPELLMAN

ROBERT M. SCHNEBERGER, et. al.,

Plaintiffs,

v.

W. RANDOLPH WHEELER, et. al.,

Defendants.

ORDER GRANTING DEFENDANT, UNITED STATES TRUSTS' MOTION FOR FULL SUMMARY JUDGMENT*, AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGEMENT

This CAUSE came before the Court on Defendant, United States Trusts' motion for summary judgment, and on Plaintiffs' motion for partial summary judgment. There is also a pending motion to dismiss, filed on behalf of United States Trust, that will not be in need of any resolution in light of this Court's ruling.

This case involves the sale of limited partnership interests in oil and gas properties. The Plaintiffs have brought suit against the principal investors, along with United States Trust, a lending institution that financed much of the activities of the limited partnership, secured by promissory notes and letters of credit. The Plaintiffs raised sections 10b, 12, and related state law security fraud claims. It is very clear to this Court that particularly as this case relates to the potential liability of United States Trust, the Plaintiffs have no cause of action under the relevant securities laws. On one level, this Court is convinced that the case law on section

*U.S. Trust shall submit a Final Judgment in accordance with this Order within ten (10) days hereof.

12 seller liability insulates United States Trust, based on its involvement as a leader in these limited partnership transactions, from the kinds of activities charged. United States Trust is not a seller of a security because the Plaintiffs have not shown that a promissory note or a letter of credit is a security or an investment contract. A bank functions as a lender of money and not as the seller of securities. *See McClure v. First Nat'l Bank of Lubbock*, 497 F.2d 490, 495 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975). Moreover, in order for a bank to be exposed to section 12 seller liability, there would have to be a much stronger showing of its own involvement as a direct seller or as a controlling person in the sale of securities. *See Wright v. Schock*, 571 F.Supp. 642, 657-58 (N.D. Cal. 1983). Because the Plaintiffs' have not convinced this Court that the lending of money in return for promissory notes or letters of credit constitute the sale of a security, nor has there been much persuasive evidence regarding the extent of the involvement that United States Trust shared in influencing these Plaintiffs to invest in these limited partnership transactions, this Court cannot find the Defendant, United States Trust, liable on any of the counts suggesting liability under these facts. *See Schlifke v. Seafirst Corp.*, [Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93, 107, at 95,440-43 (N.D. Ill. 1987) (suggesting that even if the lending institution had knowledge of fradulent activity or material misrepresentations, there is still no *duty* to disclose for section 12 purposes); *Delany v. Blunt, Ellis & Loewi*, Fed. Sec. L. Rep. (CCH) ¶92,847 at 94, 122-23 (N.D. Ill. 1986) (finding no 10b-5 claim to exist where the bank did not have an affirmative obligation to disclose information that the investors should have already known).

Finally, this Court agrees with a recent order issued by an esteemed colleague in the Southern District of Florida, involving essentially the same parties as those appearing before this Court, in which Judge Nesbitt correctly points out that United States Trust did not have a duty to disclose the fact that the sale of securities, made as a private

placement offering, did not have to satisfy the SEC's registration requirements. *United States Trust Co. v. Plotner*, Case No. 84-1859-Civ-Nesbitt. Furthermore, as to all defendants, the Plaintiffs have exceeded the statute of limitations for the filing of a section 12(1) action under either the federal rule, which contemplates a one year time frame after the sale of an unregistered security, or under Florida Statute section 95.11(4)(e), which contemplates a two year period. In either case, given the fact that the Plaintiffs first filed this action in April, 1984, over two years from the time in which they should have known that the securities were unregistered, this action is time barred. It is hereby,

ORDERED AND ADJUDGED that the Plaintiffs' motion for partial summary judgment is DENIED, and in so far as there does not appear to be material issue of fact regarding the participation of either a "seller" or "controlling person" for section 12 seller liability purposes, and the fact that the Plaintiffs' 10b claims are not any more promising in light of the role that United States Trust played as a lender in these transactions, United States Trust's motion for full summary judgment on all counts is granted. The case will proceed to trial, however, against the remaining Defendants, but this Court's ruling as to the untimeliness of the Plaintiffs' section 12 claim will be res judicata, and therefore, the case will continue on only the remaining counts.

DONE AND ORDERED in Chambers, at Miami, Florida, this 8 day of June, 1987.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

[FILED OCT 22, 1987]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 84-1859-CIV-NESBITT

UNITED STATES TRUST COMPANY OF NEW YORK, a New York Corporation,

Plaintiff/Counter-Defendant,

vs.

WARREN J. PLOTNER and COMMUNITY BANK OF HOMESTEAD, a Florida banking corporation,

Defendants/Counter/Cross Plaintiffs,

vs.

W. RANDOLPH WHEELER, ANDREW A. LEVY and BUCKEYE PETROLEUM CO., INC.,

Cross-Defendants.

ORDER

This cause is before the Court upon the Motion for Summary Judgment filed by the Plaintiff, U.S. TRUST COMPANY OF NEW YORK (U.S. TRUST). U.S. TRUST has filed its Motion for Summary Judgment as to Count I of the Amended Complaint which seeks damages against WARREN J. PLOTNER (PLOTNER) for his obligations under a promissory note executed payable to Buckeye Petroleum 1981-A and later assigned to U.S. TRUST. U.S. TRUST has also moved for summary judgment as to Counts II, III, VI, VII and VIII of PLOTNER's amended counterclaim. A summary of the facts as alleged in the pleading was previously recited in the orders of March 14, 1986 and May 22, 1986 and need not be repeated here.

In support of its Motion for Summary Judgment U.S. TRUST relies upon a final judgment entered in the case of *Robert Schneberger, et al. v. W. Randolph Wheeler, et al.*, Case No. 84-0264-CIV-SPELLMAN.

By way of brief summary, this action commenced with the filing of a complaint by U.S. TRUST seeking recovery of the amount due on a promissory note from the Defendant, PLOTNER, and for recovery thereunder pursuant to a letter of credit issued by the Community Bank of Homestead to secure payment of the note. Thereafter PLOTNER filed a twelve count counterclaim alleging violation of federal and state securities laws and state claims for fraud and civil theft.

As a result of this Court's ruling, the following counts of the amended counterclaim are still pending: Count II (§12.(2) of the Securities Act of 1933, 15 U.S.C. §77(1)(2)), Count III (§10(b) of Securities Exchange Act of 1934, 15 U.S.C. §78j(b), Counts VI and VII Fla.Stat. 517.301 (fraud in connection with the offer, sale or purchase of a security), and Count VIII §812.012-812.037 (civil theft).

These counts are identical to the counts contained in PLOTNER's third amended complaint filed against the same defendants in *Schneberger, et al. v. Wheeler, et al.*, Case No. 84-0264-CIV-SPELLMAN.[1,2]

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[1]

Plotner Amended Counterclaim		Schneberger Third Amended Complaint
Count II (§12(2) of Securities Act of 1933, 15 U.S.C. §77(1)(2))	=	Count II
Count III §10(b) of Securities Exchange Act of 1934, 15 U.S.C. §78j (b), and Rule 10b-5, 15 C.F.R. §240.10b-5	=	Count III
Count VI (Fla. Stat. §517.301)	=	Count VI
Count VII (Fla. Stat. §517.301)	=	Count VII
Count VIII (Fla. Stat. §812.012-812.037)	=	Counts IX and XV

[2]PLOTNER was joined as a Plaintiff in the *Schneberger* action on April 3, 1986.

By an order dated June 8, 1987 the Honorable Eugene P. Spellman granted U.S. TRUST's motion for summary judgment as to all fifteen counts of the third amended complaint and entered final judgment in favor of U.S. TRUST and against PLOTNER on August 11, 1987.

Under the doctrine of *res judicata* which specifically applies to final summary judgments, *Exhibitors Poster Exchange Inc. v. National Screen Service Corporation*, 421 F.2d 1313 (5th Cir. 1970), the final judgment in *Schneberger* is a bar to a relitigation of all matters which were or could have been adjudicated in *Schneberger*. Judge Spellman's order determined that U.S. TRUST was not a seller of securities and could not be liable for any claims arising under a theory of violation of securities laws. ("United States Trust is not a seller of a security because the Plaintiffs have not shown that a promissory note or letter of credit is a security or an investment contract.") *Schneberger*. Judge Spellman specifically found:

> Because the Plaintiffs have not convinced this Court that the lending of money in return for promissory notes or letters of credit constitute the sale of a security, nor has there been much persuasive evidence regarding the extent of the involvement that United States Trust shared in influencing these Plaintiffs to invest in these limited partnership transactions, this Court cannot find the Defendant, United States Trust, liable on any of the counts suggesting liability under these facts.

Plotner, having litigated all of the claims in the *Schneberger* action, is bound by the final judgment and cannot relitigate those same claims in the action pending before this Court.

Accordingly, U.S. TRUST's motion for summary judgment as to Counts II, III, VI, VII and VIII of the amended counterclaim are GRANTED.

In support of its motion for summary judgment as to Count I of the amended complaint (enforcement of this note executed by PLOTNER assigned to U.S. TRUST). U.S. TRUST recites it is a holder in due course and entitled to judgment unless a defense to payment is shown.

In summary, there is no dispute that U.S. TRUST took the note for value, and in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person. Fla.Stat. §673.302(1). In defense of summary judgment as to the note, PLOTNER relies upon the allegations that Defendant engaged in fraudulent activities "in connection with the offer and sale to Plaintiff of limited partnership interests and in the connection with the solicitation of promissory notes from Plaintiff[s]." (paragraphs 2, 21 and 22 and Count VIII of the amended complaint.)

PLOTNER has not presented any facts to support the assertion of bad faith, or fraud in the underlying transaction by U.S. TRUST sufficient to create a genuine issue as to good faith. *Barnett Bank v. Regency Highland Condominium Association, Inc.*, 452 So.2d 587 (Fla. 4th DCA 1984).

The thrust of PLOTNER's defense of fraud is that the bank knew that the promissory note, letter of credit and other documentation were issued in exchange for PLOTNER's purchase of the limited partnership interest in Buckeye, that the bank's loans were a part of the investment program participation in the investment loan program, and by use of the acknowledgment and election sheet that U.S. TRUST was closely connected with Buckeye and "knew" it was participating in an illegal transaction which would support a finding of bad faith sufficient to preclude summary judgment.

These are the types of allegations which have been held insufficient, individually or collectively, to support a finding of bad faith on the part of a bank which finances a limited

partnership transaction. *Barnett Bank v. Regency Highland Condominium Association, Inc.*, 452 So.2d 587 (Fla. 4th DCA 1984). As concuded by Judge Spellman:

> A bank functions as a lender of money and not as the seller of securities. . . . Moreover, in order for a bank to be exposed to Section 12, seller liability,[3] there would have to be a much stronger showing of its own involvement as a direct seller or as a controlling person in the sale of securities. *See Wright v. Schock*, 571 F.Supp. 642, 657-58 (N.D.Cal. 1983).

PLOTNER has therefore represented legally insufficient facts to create a genuine issue as to bad faith.

The other issue in support of defenses to enforcement of the note arise from PLOTNER's allegations of some form of fraud in the inducement by U.S. TRUST in issuing the financing documentation. As there is no genuine issue that U.S. TRUST is a holder in due course the defense of fraud in the inducement is a personal defense of the maker which is not available to a holder in due course.") *Seinfeld v. Commercial Bank & Trust Co.*, 405 So.2d 1039 (Fla. 3d DCA 1981). Further, it is undisputed PLOTNER required the Note, Election Sheet and acknowledgment letter which recognize the bank as a holder in due course and discharging any representations by the Bank. PLOTNER's affidavit that he did not understand what he was signing in itself without any facts or circumstances of wrongful action by the U.S. TRUST at the time of the execution of the forms cannot preclude a summary judgment for U.S. TRUST as to the enforceability of the note. It is not sufficient for PLOTNER to allege a factual dispute, he must demonstrate that genuine issues of material fact exist. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986). Moreover, Plaintiff must present affirmative

[3] §12(1) and (2) of the Securities Act of 1933 (fraud).

evidence in order to defeat a motion for summary judgment. *Anderson*, 106 S.Ct. at 2514 ("Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment not rest upon mere allegation or denials of his pleading, but must set for the specific facts showing there is a genuine issue for trial."); *Cleckner v. Republic Van & Storage Co., Inc.*, 556 F.2d 766 (5th Cir. 1977. Thus, it is not, as PLOTNER argues, the bank's burden to "show conclusively that Plotner had knowledge of the "statements" contained in the form, but PLOTNER's burden to demonstrate that by some action of U.S. TRUST he was prevented from reading the instrument or induced to refrain from reading the documents. *See Allied Van Lines, Inc. v. Bratton*, 351 So.2d 344 (Fla. 1977).

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff U.S. TRUST's Motion for Summary Judgment as to Count I of the amended complaint and to Counts II, III, VI, VII and VIII of the amended counterclaim are GRANTED.

It is further ORDERED that U.S. TRUST shall submit a final judgment in accordance with this order within ten (10) days hereof.

DONE AND ORDERED at Miami, Dade County, Florida this 21st day of October, 1987.

/s/ Lenore C. Nesbitt

LENORE C. NESBITT
U.S. DISTRICT JUDGE

cc: Counsel of Record

FF.100587.k

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 87-5583

D.C. Docket No. 84-0264

ROBERT M. SCHNEBERGER, et al.,

Plaintiffs–Appellants,

versus

W. RANDOLPH WHEELER, et al.,

Defendants,

UNITED STATES TRUST COMPANY OF NEW YORK,
a New York Corporation,

Defendant–Appellee.

No. 87-6025

D.C. Docket No. 84-1859

UNITED STATES TRUST COMPANY OF NEW YORK,
a New York Corporation,

Plaintiff–Counterclaim–Defendant–Appellant,

versus

WARREN J. PLOTNER,

Defendant–Counterclaim–Plaintiff–Appellant,

versus

RANDOLPH WHEELER, ANDREW A. LEVY
and BUCKEYE PETROLEUM CO., et al.,

Counterclaim–Defendants.

**Appeals from the United States District Court
for the Southern District of Florida**

Before KRAVITCH and EDMONSON, Circuit Judges, and HOFFMAN*, District Judge.

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*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

J U D G M E N T

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the orders of the District Court appealed from, in this cause be and the same are hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 10, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE:

[FILED JAN 31, 1989]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-5583

ROBERT M. SCHNEBERGER, et al.,

Plaintiffs–Appellants,

versus

W. RANDOLPH WHEELER, et al.,

Defendants.

UNITED STATES TRUST COMPANY OF NEW YORK,
a New York corporation,

Defendant–Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 10, 1988, 11 Cir., 198__, ____F.2d____).
( )

Before KRAVITCH and EDMONDSON, Circuit Judges, and HOFFMAN*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

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*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson

United States Circuit Judge

[FILED JAN 31, 1989]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-6025

UNITED STATES TRUST COMPANY OF NEW YORK,
a New York corporation,

Plaintiff–Counterclaim–Defendant–Appellee,

versus

WARREN J. PLOTNER,

Defendant–Counterclaim–Plaintiff–Appellant,

versus

RANDOLPH WHEELER, ANDREW A. LEVY and
BUCKEYE PETROLEUM CO., et al.,

Counterclaim–Defendants.

**Appeal from the United States District Court
for the Southern District of Florida**

**ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC**

(Opinion November 10, 1988, 11 Cir., 1988, ____F.2d____).
(January 31, 1989)

Before KRAVITCH and EDMONDSON, Circuit Judges,
and HOFFMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

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*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson

United States Circuit Judge

Securities and Exchange Act of 1934, §10(b), 15 U.S.C. §78j. **Manipulative and deceptive devices.**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the any facility of any national securities exchange —

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. §240.10b-5. **Employment of manipulative and deceptive devices.**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. §78j), [13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

Rule 56. **Summary Judgment.**

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed.R.Civ.P. 56 (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)